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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 279

HIGHLANDER FOLK SCHOOL, *et al.*

v.

STATE OF TENNESSEE *ex rel.* A. F. SLOAN, District Attorney General, 18th Judicial Circuit

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

REPLY MEMORANDUM OF PETITIONER

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I

Respondent seeks to sustain the rev*ain* the revocation of Petitioner Highlander's charter on the ba*r* on the basis that Highlander has engaged in the "unlawful s*a* unlawful sale of intoxicating beverages", and that such constitute*h* constituted a violation of the liquor laws and the nuisance statut*sance* statutes of the State. It insists that the authorities relied on*es* relied on by Highlander apply only to social clubs, and have no and have no application to

transactions by educational institutions. It is clear from a reading of these cases that this suggested distinction is untenable. Those cases do not purport to hold that social clubs may engage in the sale of intoxicating liquors; rather they deal squarely with the question presented here, namely, what elements must be present in a transaction to constitute a "sale" or "trading operations" within the meaning of the relevant statutes. That this is so is demonstrated beyond doubt by the fact that the *Mountain City*, *Moriarty*, and *Dwyer* cases were simply applications of the law of Tennessee as it had originally been enunciated in a case which specifically involved an educational institution. In *State* v. *Smith*, 24 Tenn. 394, a director of a school had successfully defended himself against an attack by the State predicated on the proposition that he had failed to pay certain taxes as a merchant, engaged in trading operations, which allegedly accrued because of his furnishing items to his staff and students. It was the *Smith* case that was explicitly relied on by the Tennessee Supreme Court when it held in *Dwyer* that the activities there under attack did not involve a violation of the laws of the State of Tennessee, because such activity was not a sale or trading operation.

In the series of cases relied on by petitioner, the State Supreme Court laid down certain conditions which, when met, establish that the handling of alcoholic beverages, or other commodities, does not constitute a sale or commercial activity, and hence cannot be a violation of the liquor laws or the public nuisance laws of the State. These conditions, explicitly set forth in these cases, and all met by the petitioner, are:

1. That the corporation is organized under the general welfare laws of the State.

2. That the handling of the commodities by the corporation is incidental to its main purpose (R. pp. 1511, 1587, 782).

3. That no profit is realized by the corporation from the handling of these commodities (Highlander's system was operated at a loss, R. p. 722).

4. That the commodities are handled for the convenience and necessity of those the corporation is chartered to serve. (Highlander had these items available because many of its students were Negroes and could not purchase such items in the nearby community of Monteagle, R. pp. 722, 820, 1511-1513, 1587).

Having met all of these conditions, Highlander did not engage in a "sale" or in "commercial activities", and hence could not, consistent with the Fourteenth Amendment, be found guilty of violating the liquor laws or the nuisance statutes of the State.

II

Respondent further seeks to sustain the revocation of petitioner's charter on the basis that Highlander was found to have been operated for the personal gain of its President in violation of the statutes and its charter. The first difficulty with this position is that it overlooks the constitutional invalidity of the jury verdict upon which respondent relies. As shown in petitioner's original brief (pp. 5-8), the jury freely admitted its prejudice against petitioner, and its verdict was further infected by the introduction in evidence by respondent of inflammatory material which had no relevance to the issue before the jury.

Apart from this defect in the verdict, petitioner has pointed out that in any event charter forfeiture is not available under Tennessee law as a sanction for the

"personal gain" portion of respondent's case. In controverting this position respondent first points to the provisions of petitioner's charter. It is, however, settled Tennessee law that the inclusion or exclusion of certain provisions, not required by the statute, in a printed corporate charter add nothing to the charter in the way of granting the State the power of revocation. See *Armstrong Dulin Varnell Co.* v. *J. W. Williams, et al.*, 148 Tenn. 388; *State ex rel.* v. *Southern Publishing Assn.*, 169 Tenn. 257.

Alternatively, respondent seeks to sustain the revocation of petitioner's charter as a sanction for the allegedly improper alienation of property on the ground that the laws of Tennessee so permit, citing the case of *State ex rel.* v. *National Optical Stores Co.*, 189 Tenn. 433. In fact, that case has no bearing whatsoever here.

The provision of Tennessee law applicable to the "personal gain" portion of respondent's case is T.C.A. 23-2802 (quoted in Appendix D of respondent's brief). This statutory section has long been held to be that applicable to public corporations, *i.e.*, general welfare corporations. See *State* v. *Elliston*, 63 Tenn. 99; *State ex rel.* v. *Thompson*, 193 Tenn. 395. The section is designed

> "* * * to prevent malversation, peculation, and waste; to set aside and restrain improper alienation of such property or funds; and to secure them for the benefit of those interested, and generally to compel faithful performance of duty."

Under it the State is limited to the remedy provided by T.C.A. 23-2817, wherein it is stated:

> "* * * In the event the Court should find that the corporation, its stockholders, directors, officers or

managers, have intentionally impaired or depreciated its assets or property for the purpose of preventing the corporation from effectively discharging its duty to the public, the property of the corporation shall escheat to the State, unless the stockholders, directors, officers, or managers, within a reasonable period fixed by the Court, restore to the treasury of the corporation a sufficient amount of money or property to enable it to effectively discharge its duty to the public."

The *National Optical Stores Company* case was brought as a quo warranto proceeding under an altogether different statute, T.C.A. 23-2801, in aid of the healing art statutes of the State of Tennessee, and the fact that the sanction of charter revocation was held to be available there is simply irrelevant to the present case.

CONCLUSION

No adequate state ground supports the decision below. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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